Court of Appeals No. 48805-1-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHRISTINE RICHARDSON,

Respondent,

v.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner.

RESPONDENT CHRISTINE RICHARDSON'S OPENING BRIEF

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I. INTRODUCTION

GEICO has asked this court to review a decision made by the trial court regarding the scope of discovery that Richardson is entitled to receive in this underinsured motorist/bad faith action against her first party insurer. The February 25, 2016 discovery order presently on appeal is founded upon the trial court's mid-2014 finding that a reasonable person would believe that a civil fraud has occurred with respect to GEICO's handling of Richardson's first party insurance claims. In making that finding, the trial court strictly adhered to the analysis set forth by the Washington Supreme Court in Cedell v. Farmers Ins. Co. of Washington, 176 Wn.2d 686, 295 P.3d 239 (2013) and held that the attorney-client privilege has been waived by GEICO as to Richardson's PIP and UIM claims. GEICO's appeal of the February 25, 2016 order cannot challenge the mid-2014 trial court's finding that Richardson showed a good faith belief that a civil fraud has occurred, or that GEICO failed to overcome the presumption of discoverability, or that, as a result of those findings, its attorney-client privilege has been waived in this insurance bad faith case.

GEICO is being represented by the same law firm that represented the insurer in Cedell, whose conduct necessitated the creation of law to permit insureds to receive unobstructed discovery regarding the handling

of insurance claims. (Rory Leid and Ryan Hall are partners in Cole Wathen Leid Hall, P.C.). Insurers in Washington State are no longer able to conceal bad faith by involving an attorney in the claims-handling process and then asserting an attorney-client privilege.

The discovery orders were proper and fall completely within the trial court's discretion. Richardson respectfully requests that GEICO's appeal be denied by this Court.

II. RESPONDENT'S RESTATEMENT OF ISSUES PRESENTED

1. Did the trial court abuse its discretion in permitting discovery of activities occurring after August 19, 2013, the date of filing of the complaint in this matter, where, as here, a) there is no legal basis for withholding discoverable information or documents based upon the date of filing of a complaint; b) in mid-2014, GEICO had been found to have waived attorney-client privilege pursuant to Cedell; and c) no "post-litigation" privilege exists to prevent an insured from discovery of bad faith conduct that occurred before litigation commenced, or that continues after litigation is commenced? [The Court committed NO error.]

2. Did the trial court abuse its discretion in permitting discovery of the handling of Richardson's PIP claim by attorney Sharon Dear, which occurred prior to August 19, 2013, the date of filing of the

complaint in this matter, where, as here a) GEICO had been found to have waived attorney-client privilege pursuant to Cedell; and b) GEICO offers no legal authority or argument to support its position in its Opening Brief? [The Court committed NO error.]

III. RESPONDENT'S RESTATEMENT OF THE CASE

A. Richardson's Automobile Collision and Injury

On February 11, 2010, Richardson was the driver of a vehicle that was violently struck from behind, causing a chain reaction collision. As a result of the collision, Richardson's vehicle was totaled and she suffered injuries to her neck, back, chest, pelvis, and hips. (CP 4)

B. GEICO Wrongfully Terminates Richardson's PIP Benefits

Richardson had purchased $35,000 of PIP coverage from GEICO, in case she was injured and needed medical treatment. Richardson opened a PIP claim with GEICO, and submitted her medical bills to GEICO for payment pursuant to the terms of her policy. (CP 4)

Approximately five months after the collision, on July 7, 2010, GEICO required Richardson to submit to medical examination by a chiropractor of its choice. GEICO's chiropractor reported that all of Richardson's medical treatment since the collision was reasonable, customary, and medically necessary. However, GEICO terminated

payment for all massage and physical therapy, and limited payment for chiropractic treatment for twelve weeks. (CP 5)

Richardson retained legal counsel to represent her and her counsel demanded a September 29, 2011 PIP arbitration proceeding against GEICO pursuant to her policy of insurance. In his decision, the arbitrator directed GEICO to pay for all treatment received by Richardson from the date of the collision through the date of his decision, October 8, 2011, and to continue to pay for all medical treatment that is reasonable, necessary, and incurred within three years from the date of the automobile collision up to the PIP policy limits of $35,000. (CP 6)

C. GEICO Offers Richardson No UIM Benefits

As part of her automobile policy with GEICO, Richardson was also entitled to Underinsured Motorists Coverage (UIM) in the amount of $50,000. The negligent tortfeasor in this case was covered by an automobile liability policy with a limit of only $25,000 at the time of the collision. Because Richardson's damages greatly exceed $25,000, the negligent driver's insurer paid its policy limits to Richardson. (CP 6-7)

Despite the fact that Richardson's medical bills of more than $38,000 far exceed the amount that she has been able to obtain from the negligent driver's policy, $25,000, GEICO refused to extend any benefits to Richardson pursuant to her UIM coverage. (CP 8)

Richardson initiated this case on August 19, 2013, naming her first party insurer, GEICO, as the defendant. Richardson asserts claims of bad faith, breach of contract, Consumer Protection Act violations, negligence, and violation of the Insurance Fair Conduct Act. (CP 1-15).

As part of discovery, Richardson sought documents from GEICO, but GEICO withheld documents on the basis of attorney-client privilege. (CP 1002 - 1003) A Motion to Compel was filed by Richardson's counsel and was heard by Kitsap County Superior Court on May 30, 2014. (CP 974-985) After several motions for reconsideration by GEICO, which were all denied, the trial court held, pursuant to Cedell, that there was a foundation for permitting a claim of bad faith to proceed, and that as a result, the attorney-client privilege was waived as to both GEICO's PIP and UIM claims files. (CP 86-88; CP 106-109; CP 127-129).

The trial court's final order regarding this matter was filed on September 12, 2014. (CP 127-129). The trial court consistently rejected the argument that documents generated after August 19, 2013 were absolutely privileged. (CP 127). The trial court held that the attorney-client privilege was waived as to documents that were generated after the August 19, 2013 date. (CP 128). However, in order to address GEICO's concern that the Court was making a blanket holding that even the defense counsel's litigation file was going to be ordered to be produced, (CP 114),

the Court limited the disclosure to those files that it had reviewed *in camera*. (CP 128).

Thereafter, Richardson sought answers to a second set of written interrogatories and requests for production. GEICO consistently failed to produce complete answers and responses. (CP 1050-1058). Richardson then proceeded with a corporate deposition of GEICO in order to obtain complete answers, and to explore whether or not all responsive documents had been produced. (CP 1026-1046).

During that corporate deposition, the corporate representative for GEICO was repeatedly instructed by its counsel not to answer questions, frequently on the basis that the information sought occurred after litigation had been filed, even though this Court previously ruled that documents subsequent to the start of this litigation were not privileged. (CP 1059-1090). For example, GEICO's corporate representative was instructed not to disclose whether or not there were any e-mails that pertained to Richardson, if those e-mails were generated between GEICO employees after the date the complaint was filed. (CP 1088). As another example, GEICO failed to disclose the *identity* of any adjusters who had been assigned to Richardson's claims, if they had been assigned after the date the complaint was filed. (CP 1066).

On February 22, 2016, the trial court held that there was no blanket privilege that permitted GEICO to withhold discovery simply because the event occurred after litigation had been filed. (CP 956). On February 25, 2016, the trial court issued its written ruling on the discoverability of information and documents, once again rejecting GEICO's "post-litigation" privilege. (CP956-958) This appeal primarily relates to the February 25, 2016 discovery order.

Although GEICO appeals the February 9, 2016 trial court order that was issued subsequent to the *in camera* review of Sharon Dear's legal file, those materials were all generated prior to the August 19, 2013 commencement of suit, as the February 9, 2016 order explicitly states. (CP 611). GEICO's Opening Brief includes no argument as to any alleged errors relating to these particular orders.

IV. ARGUMENT

A. Standard of Review of Discovery Order is Abuse of Discretion

Respondent Richardson filed a "Renewed Motion for and Order Compelling Discovery" on February 11, 2016 with the trial court. (CP 1514-1527). The issues were set forth as follows: 1) Is Richardson entitled to full and complete answers to the above listed discovery requests? 2) Is Richardson entitled to continue the corporate deposition

of GEICO, without obstruction? 3) Is Richardson entitled to sanctions as a result of these egregious discovery violations?

The relief sought by Richardson was an order requiring GEICO to produce a complete copy of its UIM file, and complete answer to Interrogatories Nos. 22, 25, 26, 83-86, and Requests for Production Nos. 4, 5, 44-47, and 72. (VRP 2/22/16, pg. 9, ln 20 – pg. 10, ln 9).

The trial court heard oral argument on February 22, 2016. The primary issue addressed in that argument was a challenge to GEICO's position that everything that occurred after the filing of the complaint by Richardson on August 19, 2013 is not discoverable. (VRP 2/22/16, pg. 5, ln. 7-12). The trial court dismissed GEICO's "post-litigation" argument:

> I do have a problem generally, Mr. Leid, with the idea that everything that happens after a certain point is privileged. I don't believe that's true. It has to actually fall within the very specific parameters of the privilege. So that would be work product, or attorney-client privilege.
>
> Two employees gossiping with each other about Ms. Richardson is not a privileged communication, just as an example. Um, and so I don't agree with sort of a blanket response that anything that happens after a certain point is privileged. (VRP 2/22/16, pg. 38, ln. 1- 11.)

After the hearing, the trial court issued its "Order Concerning Motion to Compel Heard February 22, 2016". (CP 956-958) This is the order on appeal, which is nothing more than an order mandating GEICO to produce discovery to Richardson.

Because this is a discovery order, the trial court's exercise of its discretion in ordering pretrial discovery is reviewed for manifest abuse of discretion, which occurs only if its decision is manifestly unreasonable or based on untenable grounds. Cedell at 694. The inherent power to permit pretrial discovery is a matter soundly within the discretion of the trial court. State v. Mecca Twin Theater & Film Exchange, Inc., 82 Wn.2d 87, 90, 507 P.2d 1165 (1973) *citing* State v. Masaros, 62 Wn.2d 579, 384 P.2d 372 (1963). In order to enhance the search for truth, "trial courts are encouraged to exercise this discretion..." Mecca, *supra*, citing State v. Boehme, 71 Wn.2d 621, 430 P.2d 527 (1967). This discretion includes the management of the discovery process in a fashion that will implement the goal of full disclosure of relevant information, and at the same time afford the participants protection against harmful side effects. Penberthy Electromelt Intern. Inc. v. U.S. Gypsum Co., 38 Wn. App. 514, 521, 686 P.2d 1138 (1984) *citing* Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 654 P.2d 673 (1982).

GEICO's argument that this appeal involves a question of law, mandating a *de novo* standard of review, is completely misplaced. The issues involving GEICO's privileges were determined by the trial court over two years ago, in mid-2014. At that time, the trial court issued multiple orders finding that a reasonable person would have a reasonable

belief that an act of bad faith had occurred and thus, GEICO's attorney-client privilege was deemed waived, pursuant to Cedell. (CP 86-88; CP 106-109; CP 124-126; and CP 127-129)

Those trial orders issued in mid-2014 were never appealed by GEICO, nor are they appealable now. Any alleged error or change to the status quo by holding that the attorney-client privilege has been waived is not a basis for review of more recent discovery orders. The discovery order at issue simply compels disclosure of documents and information that are continuing to be improperly withheld because GEICO continues to assert that post-litigation conduct cannot form the basis for a bad faith claim.

Because the orders on appeal strictly relate to pretrial discovery, the appropriate standard of review is abuse of discretion.

B. The Trial Court Previously Followed Legal Analysis from Cedell in Determining that the Attorney-Client Privilege is Pierced for Both PIP and UIM Claims

GEICO argues that Cedell does not apply to UIM claims. Not only is its argument irrelevant to the discovery order on appeal, its argument is unsupportable given the express language of Cedell to the contrary: "However, even in a claim alleging bad faith in handling of a UIM claim, there are limits to the insurer's attorney-client privilege. Where there is a

valid attorney-client privilege, the fraud exception is one of the exceptions that will pierce the privilege." Cedell at 697 (footnotes omitted).

The privilege has never been "treated as absolute; but rather, must be strictly limited to the purpose for which it exists." Dike v. Dike, 75 Wn.2d 1, 11, 448 P.2d 490, 496 (1968).

> [The] attorney-client privilege does not protect attorney-client communications made in furtherance of crime or fraud. *State v. Richards,* 97 Wash. 587, 591, 167 P. 47 (1917) (communications involving proposed blackmail); *Cedell v. Farmers Ins. Co. of Wash.,* 176 Wash.2d 686, 699, 295 P.3d 239 (2013).

In re Disciplinary Proceeding Against Jackson, 180 Wn.2d 201, 225, 322 P.3d 795 (2014).

In the UIM context, an insurer's attorney-client privilege may be pierced on several grounds, including civil fraud. Cedell at fn. 4.

GEICO further argues that Richardson has "failed to establish GEICO has engaged in bad faith tantamount to civil fraud." Opening Brief at pg. 10. These were arguments GEICO asserted in mid-2014, which were rejected by the trial court. (CP 107). Again, the trial court's findings and orders on these issues, from mid-2014, are not on appeal.

GEICO fails to sufficiently articulate its premise that the February 24, 2016 order is itself contrary to law, given the fact that the mid-2014 trial court orders pierced the insurer's attorney-client privilege. The trial

court's order dated February 24, 2016, which is presently on appeal, does not even refer to Cedell. This is a nothing more than a blatant attempt to circumvent the Rules of Appellate Procedure by asserting an untimely appeal.

C. The Trial Court Previously Pierced the Attorney-Client Privilege in Order to Permit Richardson to Discover Facts to Support Her Claim of Bad Faith

GEICO's present appeal is essentially an "appeal" of the decision of Cedell, in which the Washington State Supreme Court held that the attorney-client privilege may not be used to shield an insurer's bad faith conduct:

> When an insured asserts bad faith against his insurer in the way the insurer has handled the insured's claim, unique considerations arise. ... The insured needs access to the insurer's file maintained for the insured in order to discover facts to support a claim of bad faith. Implicit in an insurance company's handing of claim is litigation or the threat of litigation that involves the advice of counsel. To permit a blanket privilege in insurance bad faith claims because of the participation of lawyers hired or employed by insurers would unreasonably obstruct discovery of meritorious claims and conceal unwarranted practices.

Id. at 696-97 (internal citations omitted). The trial court in the instant case carefully considered how to handle the attorney-client privilege in making its rulings, both in mid-2014 and on February 25, 2016. GEICO's behavior is fully discoverable, as it must be in this bad faith case.

In the latter order, the trial court explicitly carved out a narrow limitation to the waiver of privilege with respect to the discovery sought by Richardson: "The responsive discovery must involve one or more employees of GEICO. There is no discovery authorized which *solely* involves the activities of Defense Counsel." (CP 956-958). This carefully crafted limitation prevents the obstruction of discovery of bad faith by GEICO, while simultaneously preserving the fundamental purpose of the privilege.

Bad faith cases certainly are unique in the way that attorney-client privilege is handled. In Cedell, the Washington State Supreme Court weighed the factors to be considered before holding that a civil fraud exception exists that may pierce the attorney-client privilege in insurance bad faith cases.

It is a gross exaggeration to represent that the trial court's February 25, 2016 order leaves GEICO unable to defend itself. (Opening Brief, pg. 12). In the case that an attorney is found to have been instrumental in participating in the bad faith conduct on behalf of its insurer-client, that attorney must be disqualified and alternative counsel may appear. (*See* Langley v. GEICO Gen. Ins. Co., WL 14-CV-3069-SMJ (E.D. Wash. May 4, 2016), Appendix A), in which Rory Leid was disqualified as counsel by Judge Mendoza because he was properly subpoenaed to testify at trial as a

direct witness to GEICO's bad faith conduct.) If Mr. Leid is interacting with GEICO regarding the manner in which Richardson's claim and the litigation of that claim is being handled, as he was in Mr. Langley's case, then he very well may be a witness in the instant case as well. Once Richardson obtains discovery resulting from the February 25, 2016 order, Mr. Leid's role will become readily apparent.

In the meanwhile, GEICO is asking this Court to disregard the holding of Cedell by permitting its bad faith conduct to remain concealed from discovery by Richardson. Not only would such a ruling be contrary to the law of Cedell, it would encourage insurers to continue a practice of committing bad faith under a cloak of attorney-client privilege. That is far from an absurdity, as GEICO suggests.

D. The Trial Court Properly Held that GEICO Could Not Withhold Discovery of Bad Faith Conduct on the Basis of a "Post-Litigation" Privilege

Throughout the discovery phase of this litigation, GEICO engaged in a pattern of silent withholding on the basis that nothing that occurred after the filing of the complaint by Richardson was discoverable. This was undetectable until Richardson took GEICO's corporate deposition and the representative was repeatedly instructed not to answer questions that involved facts occurring after the filing of the complaint. (CP 1088). The

silent withholding of information from discovery is impermissible in any case, including bad faith cases.

> Because discovery is, by design, intended to be broad, a party wishing to assert a privilege may not simply keep quiet about the information it believes is protected from discovery; it must either, reveal the information, disclose that it has it and assert that it is privileged, or seek a protective order.

Cedell at 695. In the instant case, GEICO took no action whatsoever; it simply concealed information occurring after the date the complaint was filed, and when that issue came to light, it asserted its unspoken "post-litigation" privilege. Unbeknownst to Richardson at the time, GEICO took this position to an extreme by redacting its claims files in order to thwart the trial court's ability to conduct a complete *in camera* review of those claims files. (VRP 2/22/16 pg 7-8). Apparently this is an ongoing practice of GEICO and its counsel in defending litigation. *See* Batchelor v. GEICO Casualty Company, 2016 WL 3552729 (M.D.Fla. June 29, 2016) (finding "Geico's litigation misconduct also included: (1) withholding and redacting non-privileged material during discovery based on improper assertions of ACCP; (2) submitting false statements to the Court during discovery to avoid *in camera* inspection of its improperly withheld and redacted documents...). Attached as Appendix B.

Upon discovering this silent withholding by GEICO and the assertion of a "post-litigation" privilege, Richardson moved for an order to compel discovery. In response, GEICO submitted a brief which stated:

> Insurers have a legitimate right to vigorously defend themselves against first party lawsuits. As such the work product doctrine and anticipation of litigation privileges apply to the documents generated Post Litigation (i.e., 8/19/13), including loss reserves. (CP 881).
> ...
> Once litigation commenced, GEICO's actions were no longer being conducted in the ordinary course of business, but rather GEICO began defending itself in this litigation. As such, anything post suit is absolutely privileged. (CP 886).

GEICO asserts the identical arguments in its Opening Brief, at pg. 18.

At oral argument, the trial court pointedly inquired as to GEICO's position as to its duties to its insured in order to ascertain GEICO's position. GEICO's counsel made it perfectly clear that its position was that there were no ongoing duties to the insured:

> THE COURT: Okay. So Mr. Leid, I have a question for you. So do you agree that your client has an ongoing duty to process the claim?
> MR. LEID: Not in litigation, no. Absolutely not. (VRP 2/22/16, pg. 23, ln. 19 – 22).

The trial court had no reservations about rejecting GEICO's "blanket response that everything that happens after a certain point in privileged," (VRP 2/22/16, pg. 38, ln. 7 -11; CP 957), and set forth the issue that the court would take under advisement:

> Where my focus is going to be, in terms of issuing a decision is going to be on the general question of whether or not the way GEICO is choosing to handle this case itself raises a question of this ongoing duty to process, based on the fact that they're now in a litigation posture. That's the distinction I'm trying to split the hair of. (VRP 2/22/16, pg. 38, ln. 12 – 17.)

The trial court conducted extensive research on the issue of whether post-denial or post-litigation conduct can be a basis for a bad faith claim. The trial court's order cited cases that were found to support the contention that such evidence was not just discoverable, but admissible at trial. In White, v. Western Title Ins. Co, 40 Cal. 3d 870, 710 P.2d 309, 316-17, 221 Cal. Rptr. 509 (Cal. Dec. 31, 1985), cited by the trial court, the California Supreme Court explained its rationale in detail:

> We believe, however, that the issue can be resolved as a matter of principle. It is clear that the contractual relationship between insurer and the insured does not terminate with commencement of litigation. In an automobile liability policy, for example, even if the insurer and insured were engaged in litigation concerning coverage of one accident, if the insured were involved in another accident within the policy terms and coverage he would certainly be protected. ... And it is not unusual for an insurance company to provide policy benefits, such as the defense of litigation, while itself instituting suit to determine whether and to what extent it must provide those benefits. It could not reasonably be argued under such circumstances either that the insurer no longer owes any contractual duties to the insured, or that it need not perform those duties fairly and in good faith.
>
> Defendant's argument is less unreasonable in a case in which the insured filed suit (obviously the insurer could not

> be permitted to terminate its own obligations by initiating litigation), and the issue is limited to the insurer's duty of good faith and fair dealing in regard to the specific subject matter of the suit. But even here a sharp distinction between conduct before and after suit was filed would be undesirable. Defendant's proposed rule would encourage insurers to induce the early filing of suits, and to delay serious investigation and negotiation until after suit was filed when its conduct would be unencumbered by any duty to deal fairly and in good faith. Defendant responds that such delay would itself be a breach of the implied covenant, but the incentive would remain, especially since the insured would find it difficult to prove the prelitigation conduct unreasonable if it could not present evidence of the postlitigation conduct by way of contrast. The policy of encouraging prompt investigation and payment of insurance claims would be undermined by defendant's proposed rule.

Nies v. National Auto. & Casualty Ins. Co., 199 Cal. App. 3d 1192, 245 Cal. Rptr. 518 (Cal.App. 2 Dist. Mar. 29, 1988), cited by GEICO on pg. 24 of its Opening Brief, does not limit the holding in White, *supra*; it simply reflects that evidence that is discoverable is not necessarily admissible. Nies at 1202.

T.D.S, Inc. v. Shelby Mut. Ins. Co., 760 F.2d 1520 (11th Cir. 1985), as cited by the court explains another rationale:

> The gist of Shelby's complaint is that TDS was allowed, over objection, to attack the accuracy and adequacy of the fire investigation which Shelby asserted resulted in the denial of TDS's claim. According to Shelby, the assessment of punitive damages was based not on any evidence of an independent tort, but rather on Shelby's decision to raise an arson defense. From this reasoning, it follows that evidence of Shelby's litigation conduct and the evidence concerning

> the adequacy of the basis upon which Shelby denied the claim was irrelevant to the independent tort claim. The straw man erected by Shelby, however, is easily dismantled.
>
> Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. ... Although this conduct occurred after the denial of TDS's claim, it did corroborate TDS's contention that Shelby deliberately deceived it while Shelby was investigating the fire. Additionally, much of the evidence concerning the recklessness of the investigation and the poor quality of the investigative reports Shelby stated it relied upon to deny TDS's claim is relevant to the issue of whether in fact the fire was the result of arson and, if so, the identity of the arsonist. Surely these are matters of consequence in an insurance suit where arson is raised as a defense.

The Mississippi Supreme Court, Gregory v. Continental Ins. Co., 575 So. 2d 534 (Miss., 1990), cited by the trial court, put it much more succinctly:

> The circuit judge never considered Continental's conduct following filing of the complaint, and here we find he erred. An insurance carrier's duty to promptly pay a legitimate claim does not end because a lawsuit has been filed against it for nonpayment. Put more bluntly, if you owe a debt the duty to pay does not end when you are sued for nonpayment of it.

The trial court also cited a Washington federal case, Babai v. Allstate Ins. Co., 2015 WL 1880441 at *4-5 (W.D. Wash., April 24, 2015) which rejected this same insurance defense law firm's identical argument:

> The Court finds no basis to assume that Allstate's ongoing contractual obligation to Plaintiff terminated after the initial

> coverage determination on February 1, 2012 and after Plaintiff retained counsel. Allstate's argument has also been rejected by other courts. *See Tavakoli v. Allstate Prop. & Cas. Ins.* Co., No. C11-1587RAJ, 2013 WL 153905, at *4 (W.D. Wash. Jan. 15, 2013) (finding that the insurer has a continuing obligation to adjust the insured's open claim even after litigation has commenced); *see also Garoutte v. Am. Family Mut. Ins. Co.,* No. C12-1787 BHS, 2013 WL 3819923, at *4 (W.D. Wash. July 23, 2013) (declining to adopt rule that performance under an insurance contract need not occur once a complaint is filed and distinguishing *Blake v. Federal Way Cycle Center,* 40 Wash. App. 302 (1985)).
>
> ...
>
> The February 1, 2012 denial of coverage did not liberate Allstate of its contractual obligations to Plaintiff. Thus, the Court finds the post-denial correspondence to be relevant to Plaintiff's bad faith and extra-contractual claims.

Finally, the trial court also cited Palmer by Diacon v. Farmers Ins. Exchange, 861 P.2d 895 (Mont., 1993) in support of the proposition that the filing of a complaint does not abrogate an insurer's duty to handle a claim. CP 757. This case was also cited by Cedell, at pg. 705-06, but the Washington Supreme Court did not apparently find the opinion particularly persuasive regarding the handling of privilege by an insurer in a bad faith case, as GEICO argues this Court must.

There are numerous cases throughout the country that support the legal principle that post-litigation conduct is not just discoverable, but also relevant, and admissible. *See, e.g.,* Parsons ex rel. Parsons v. Allstate Ins. Co., 165 P.3d 809, 815 (Colo. App. 2006) (bad faith breach of an

insurance contract encompasses "all of the dealings between the parties, including conduct occurring after the arbitration procedure"); Knotts v. Zurich Ins. Co., 197 S.W.3d 512, 517 (Ky. 2006) (insurer is obligated to deal in good faith in both pre- and post-litigation activities); O'Donnell ex rel. Mitro v. Allstate Ins. Co., 734 A.2d 901 (Pa.Super.1999) (bad faith suits are not restricted to the denial of claims, but, rather, may extend to the misconduct of an insurer during the pendency of litigation); Federated Mut. Ins. Co. v. Anderson, 1999 MT 288, 297 Mont. 33, 991 P.2d 915 (Mont. 1999), *abrogated on other grounds*, (the continuing duty of good faith can be breached by an insurer's postfiling conduct, which includes the actions of attorneys conducting the defense); Gooch v. State Farm Mut. Auto. Ins. Co., 712 N.E.2d 38 (Ind.App.1999) (insurance company's litigation conduct admissible in determining whether company made a bad-faith attempt to force insured to settle uninsured motorist claim); Tucson Airport Authority v. Certain Underwriters at Lloyd's, London, 186 Ariz. 45, 918 P.2d 1063 (Ariz.App.1996) (wrongful litigation conduct of insurance company toward insured during coverage lawsuit was not rendered inadmissible due to "litigation privilege").

All of these cases are directly on point and stand for the proposition that if an insurer uses an attorney to further bad faith claims against its insured, that evidence is both discoverable and admissible.

GEICO cites no *insurance bad faith* cases to the contrary. GEICO's cases are not on point as they relate to the Consumer Protection Act, including Guijosa v. Wal-Mart Stores, 144 Wn.2d 907, 32 P.3d 250 (2001) and Blake v. Fed. Way Cycle Ctr., 40 Wn. App. 302, 698 P.2d 578 (1985), and they have been repeatedly rejected for this proposition. (CP 107; CP 127); Babai at *4-5; Bird v. Am. Family Mut. Ins. Co., No. C12-1553 MJP, 2013 WL 12097809, at *1 (W.D. Wash. Sept. 30, 2013):

> The Court agrees with Plaintiff –Blake in no way supports Defendant's position in this case. The case did not concern an insurance company or allegations of bad faith in the context of insurance benefits. The "post-litigation" events with which the Blake court was concerned were related to the actual litigation itself (e.g., a settlement agreement), not to issues of whether an insurance company defendant had continued to deal in good faith with its insured after litigation had been commenced. The Blake court even recognized that, in insurance bad faith cases, actions taken after a lawsuit has been filed may be considered as evidence of whether the insurance company has acted in good faith.

In its Opening Brief, at pg. 18, GEICO cites Pappas v. Holloway, 114 Wn.2d 198, 787 P.2d 30 (1990) for the proposition that privileges extend through litigation. However, Pappas is a legal malpractice action, not an insurance bad faith case. Nevertheless, Pappas fully supports Richardson's position that the attorney-client privilege cannot be used to shield discovery of the wrongful conduct of a fiduciary. In a *first* party legal malpractice claim, the privilege is waived so as to prevent one party

(the client) from unfairly taking advantage of the rules by prohibiting disclosure of allegedly privileged information. Id. at 204. Similarly, in this *first* party insurance case, the privilege is waived to prevent one party (the insured) from unfairly taking advantage of the rules by prohibiting disclosure of allegedly privileged information.

Pappas considered the holding of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), and concurred that there is no end to a valid assertion of attorney work product. Pappas at 209-210. However, the question did not end there. Even in a *third* party case, brought by attorney Pappas against the other attorneys who represented the Holloways, the Washington Supreme Court held that the "materials which have been withheld under the work-product doctrine are discoverable". Id. at 213. This is because the materials were within "the exclusive control of the third-party defendants, are unavailable in any other source to which Pappas has access." Id. at 211.

Similarly, the facts regarding the handling of an insurance claim are also within the exclusive control of the insurer and unavailable to the insured; thus, although the work product doctrine might apply, exceptions justify discovery of those materials. Pappas is not supportive of GEICO's position that it may retain exclusive control of materials that would reveal its bad faith conduct in a first party insurance case.

The trial court in the instant case concluded that "evidence of post-denial and even post-litigation conduct [may] be introduced at trial under certain circumstances," (CP 956) but that "It does not give [Richardson] the authority to carte blanche invade [GEICO's] work-product and/or attorney-client privilege." (CP 957) Thus, GEICO has been ordered to produce the evidence in discovery, but the Court reserved questions regarding admissibility of that evidence. (CP 957)

The trial court followed the principles of Cedell in ordering discovery of all materials pertaining to GEICO's handing of the claim.

> The time-worn claims of work product and attorney-client privilege cannot be invoked to the insurance company's benefit where the only issue in the case is whether the company breached its duty of good faith in processing the insured's claim.

Cedell at 697 (*quoting* Silva v. Fire Ins. Exchange, 112 F.R.D. 699-700 (D.Mont.1986). Long ago, GEICO had an opportunity to overcome the presumption of discovery when civil fraud was alleged; it failed to do so and should not be given a second bite at the apple.

Richardson is entitled to discovery that will support her bad faith claim, irrespective of GEICO's attempt to conceal that discovery by retaining legal counsel and asserting claims of privilege.

E. Federal Court Orders on Motions for Summary Judgment are Not Binding on State Courts

GEICO cites several federal court orders, including, Stegall v. Hartford Underwriters Ins. Co., 2009 U.S. Dist. LEXIS 2690 4:08CV3252 (W.D. Wash. 2009), for the proposition that bad faith conduct occurring after litigation has been filed is somehow immune. GEICO asserts that these federal court orders are binding. (Opening Brief at pg. 24).

In Stegall, the federal court lacked subject matter jurisdiction and remanded the case back to state superior court. It is difficult to comprehend how two sentences from an order denying summary judgment, prior to dismissal for lack of subject matter jurisdiction, which pertained to the application of federal rules, would be in any way binding upon state court. (Additionally, the insurer in Stegall was subsequently found by a jury to have breached the duty of good faith and the Consumer Protection Act.)

GEICO cites Bronsink v. Allied Prop & Cas. Ins. Co, 2010 U.S. Dist. LEXIS 56159 C09-751MJP (W.D. Wash. June 8, 2010) in support of its argument, but that case supports Richardson. In Bronsink, the insurer withheld attorney-client communications and attorney work product from discovery. However, the federal court ordered production of *all* of the material that had been withheld from its insureds. Bronsink v. Allied Prop. & Cas. Ins., No. 09-751 MJP, 2010 WL 786016, at *3 (W.D. Wash. Mar. 4, 2010). See Appendix C.

None of the federal cases cited by GEICO stands for the proposition that an insurer is immune from liability for bad faith conduct continuing after the commencement of litigation. Nevertheless, none of these federal cases, interpreting RCW 48.30 et. seq., are binding upon the Kitsap County Superior Court. In re Elliot, 74 Wn.2d 600, 602, 446 P.2d 347 (1968) (state courts are not bound by federal court interpretations of state law); In re Salvini's Estate, 65 Wn.2d 442, 446-47, 397 P.2d 811 (1964) (holding that federal courts' interpretation of state statutes do not bind Washington courts).

In addition to Babai, *supra*, another Washington State federal case is directly on point. HSS Enterprises, LCC v. Amco Ins. Co., No. C06-1485-JPD, 2008 WL 163669, at *5 (W.D. Wash. Jan. 14, 2008). In HSS, the Court:

> ...reject[ed] defendant's argument that litigation is automatically anticipated for work-product purposes when a suit is "commenced." An insurer's ordinary duty to investigate does not end when suit is filed, especially here, where filing was precipitated more by a limitation clause than a threat to litigate, separate litigation counsel was selected, and the parties immediately agreed to a lengthy stay. If the Court were to sustain the defendant's position emphasizing the filing date of the lawsuit, the work product protection would be automatically available at the whim of the insurer, regardless of whether the materials were prepared in the ordinary course of business. Insurers could insulate all claims investigation materials produced after the filing date by merely inserting an arbitrary suit

> limitation clause into its policy, and forcing its insured to sue for coverage before the claim is fully adjusted.

The rationale for rejecting the insurer's argument that materials are not discoverable is sound and consistent with federal and state court opinions.

F. Two Discovery Orders on Appeal are Not Addressed in GEICO's Opening Brief

GEICO appealed three discovery orders in this case, including two trial court orders dated February 9, 2016 and February 24, 2016. However, its Opening Brief fails to assign any error to either of these orders, and it does not make any argument that the orders should be reversed. Thus, it is impossible for the appellate court, as well as Richardson, to address any alleged error. "We do not address issues that a party neither raises appropriately nor discusses meaningfully with citations to authority." Saviano v. Westport Amusements, Inc., 144 Wn. App. 72, 84, 180 P.3d 874, 879 (2008) *citing* RAP 10.3(a)(6); State v. Mills, 80 Wn. App. 231, 234, 907 P.2d 316 (1995). Richardson requests that the Court decline to consider argument pertaining to either of these two orders.

V. REQUEST FOR ATTORNEYS' FEES

Rule of Appellate Procedure 18.1 allows a party to recover attorneys' fees and expenses on appeal where such a right is granted to that party by applicable law. RAP 18.1(a). Washington Civil Rule 37, the

primary vehicle for the Superior Court's award of discovery sanctions, has been expressly held to provide such a basis for recovery. *See* Magana v. Hyundai Motor America, 167 Wn. 2d 570, 593, 220 P.3d 191 (2009) (holding that CR 37(d) granted the right to recovery of attorneys' fees and expenses under RAP 18.1(a)); Eugster v. City of Spokane, 121 Wn. App. 799, 817, 91 P.3d 117 (2004) (holding CR 37(a)(4) to grant right to recovery of attorneys' fees and expenses under RAP 18.1). Moreover, Rule of Appellate Procedure 14.2 expressly allows for recovery of costs by the party that "substantially prevails" on appeal. RAP 14.2.

Richardson requests the Court award her attorneys' fees and costs on appeal pursuant to CR 37 because this appeal is simply a continuation of GEICO's failure to recognize and act on its discovery obligations. Richardson should prevail, and will comply with RAP 18.1. This Court should award fees on appeal to Richardson.

VI. CONCLUSION

Based upon the above authorities and argument, Respondent Richardson requests that this Court affirm the trial court's orders in all respects, and that this Court further award her costs and attorneys' fees on appeal.

DATED this 23rd day of November, 2016.

LAW OFFICE OF JEAN JORGENSEN, PS

By _____
Jean Jorgensen
WSBA No. 34964
Attorneys for Respondent Christine Richardson

CERTIFICATE OF SERVICE

Jamie Brazier declares: I am a citizen of the United States and of the State of Washington; that I am over the age of 18 years and competent to be a witness in this cause. That on November 23, 2016 I have a) emailed this document and b) arranged for delivery by legal messenger on the following business day, one true copy of the RESPONDENT'S OPENING BRIEF, to the address(es) listed below:

Rory W. Leid, III
Elyse O'Neill
Cole Wathen Leid Hall, P.C.
303 Battery Street
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Email: rleid@cwlhlaw.com
Email: eoneill@cwlhlaw.com

Dalynne Singleton
Gourley Law Group
1002 10th Street / PO Box 1091
Snohomish, WA 98291
Email: dalynne@glgmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Renton, Washington, on: November 23, 2016.

Jamie Brazier

APPENDIX A

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHERMAN BRONSINK and DAGMAR FRIESS, husband and wife, Plaintiffs, v. ALLIED PROPERTY AND CASUALTY INSURANCE, et al., Defendants.	Case No. 09-751 MJP ORDER ON AMENDED MOTION TO COMPEL RE DOCUMENTS WITHHELD ON THE BASIS OF PRIVILEGE OR WORK PRODUCT

This matter comes before the Court on Plaintiffs' amended motion to compel production of documents withheld on the basis of privilege or work product. (Dkt. No. 45.) The above-entitled Court having reviewed and received:

1. Plaintiffs' Amended Motion to Compel RE Documents Withheld on the Basis of Privilege or Work Product. (Dkt. No. 45.)
2. Defendants' Response to the Amended Motion to Compel RE Documents Withheld on the Basis of Privilege or Work Product. (Dkt. No. 57.)
3. Reply in Support of Amended Motion to Compel RE Documents Withheld on the Basis of Privilege or Work Product. (Dkt. No. 69.)

And all attached declarations and exhibits, makes the following ruling:

IT IS ORDERED that Plaintiffs' Motion is GRANTED.

Background

On June 9, 2008, Plaintiff Sherman Bronsink's ("Bronsink") commercial property burned. (Dkt. No. 45 at 1.) He filed an insurance claim under his homeowner's policy, held by Depositors. (Id.) Within two weeks Depositors had engaged its "Special Investigations Unit" to investigate. (Id. at 2.) The special investigator, Chris Gormley, contacted "panel attorney" Daniel Thenell on February 6, 2009. (Id. at 3.) Thenell agreed to assist with the claim. He also conducted Examinations Under Oath ("EUO") of Sherman Bronsink and his wife, Dagmar Friess, on March 26, 2009. (Id.) On April 9, 2009, Thenell sent a letter to Bronsink indicating that Depositors was continuing its investigation and that "no coverage determination has been made." (Id.)

On May 11, 2009, Bronsink commenced the litigation. (Id. at 4.) At that time, Michael Rogers of Reed McClure represented Depositors. (Id.) In the initial disclosure and answers to interrogatories, Depositors describes Thenell as an "attorney who assisted with claims investigation." (Dkt No. 45, Ex. C at 2, Ex. D at 4.) In response to requests for production, Depositors has withheld 91 documents from Thenell's file on the basis of attorney-client privilege or work product protection. Depositors has also withheld seven documents from the Depositors claim file on the basis of attorney-client privilege and work product, six of which were communications to or from Thenell. Bronsink now seeks production of all of these documents.

Analysis

In a diversity case, the court must apply state law to substantive issues and federal law to procedural issues. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The attorney-client privilege is a substantive issue and must be interpreted using the law of the state. Lexington Ins.

Co. v. Swanson, 240 F.R.D. 662, 666 (W.D. Wash. 2007). Work product is procedural and governed by federal law. Id.

A. Attorney-Client Privilege

Bronsink argues that the privilege does not apply to Thenell because he was acting in the role of a claims adjuster or investigator and was not necessary to the provision of legal advice. "A communication is not privileged simply because it is made by or to a person who happens to be a lawyer." Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977). Attorneys that act as claims adjusters or claims managers cannot later claim attorney-client privilege for that work. Mission Nat'l Ins. Co. v. Lilly, 112 F.R.D. 160, 163 (D. Minn. 1986); see also Schmidt v. Cal. State Auto. Ass'n, 127 F.R.D. 182, 183 (D. Nev. 1989); HSS Enter., LCC v. Amco Ins. Co., No. 06-1485, 2008 WL 163669, at *3 (W.D. Wash. Jan. 14, 2008).

Depositors argues that Thenell served as an attorney and states, "while [he] questioned plaintiffs at their examinations under oath and gave advice concerning the investigation, this does not make him an adjuster." (Dkt. No. 57 at 5-6.) The declarations of Thenell and Gormley state that Thenell did provide legal advice, but fail to provide detail. (Decls. Thenell ¶ 3, Gormley ¶ 6.) In the initial disclosures and the answers to interrogatories, Depositors describe Thenell as an "attorney who assisted with claims investigation." (Dkt No. 45, Ex. C at 2, Ex. D at 4.) The amended privilege log also fails to provide more specifics about Thenell's role in each of the documents and communications. (Rogers Decl. Ex. A.) Depositors offers no specific evidence of Thenell's role and Depositors' own characterization of Thenell is inconsistent.

A third party may claim attorney-client privilege if that third party is an agent of the attorney or the client and they are essential to the giving of legal advice. See State v. Aquino-

Cervantes, 88 Wn. App. 699, 707 (1997); State v. Gibson, 3 Wn. App. 596, 599 (1970); United States v. Kovel, 296 F.2d 918, 920 (2nd Cir. 1961). A party claiming the privilege has the burden to establish the privilege exists. Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 332 (2005). "To meet this burden, a party must demonstrate that its documents adhere to the essential elements of the attorney-client privilege adopted by this court." In Re Grand Jury Investigation, 974 F.2d 1068, 1070 (9th Cir. 1992). An attorney acting as a claims adjuster, and not as legal advisor, could still claim the privilege if that attorney was an agent necessary for the provision of legal advice. The record reflects that Thenell likely was an agent of Depositors or its attorney. However, even if Thenell served as an agent of the attorney or client, the record does not demonstrate that the withheld documents and communications were necessary for the provision of legal advice. Without some evidence to support these propositions, the withheld documents and communications cannot be protected by privilege. The declarations and privilege log do not adequately support that Thenell was necessary to the provision of legal advice such that the privilege would apply.

The Court orders Depositors to disclose documents withheld on the basis of attorney client privilege because Depositors has failed to demonstrate that the withheld documents and communications are privileged.

B. Work Product

A party asserting work product privilege must show that the materials withheld are: (1) documents and tangible things; (2) prepared in anticipation of litigation; and (3) the materials were prepared by or for the party or attorney asserting the privilege. Garcia v. City of El Centro, 214 F.R.D. 587, 591 (S.D. Cal. 2003). In the insurance context, materials prepared as part of

claims investigation are generally not considered work product due to the industry's need to investigate claims. Such materials are part of the ordinary course of business unless there is a sufficiently concrete connection between the investigation and potential litigation. Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 659 (S.D. Ind. 1991); see Pete Rinaldi's Fast Foods, Inc. v. Great Am. Ins. Cos., 123 F.R.D. 198, 202 (M.D.N.C. 1988).

Normally an insurer has to deny the claim before a reasonable threat of litigation may arise. Id. "However, if the insurer argues it acted in anticipation of litigation before it formally denied the claim, it bears the burden of persuasion by presenting specific evidentiary proof of objective facts demonstrating a resolve to litigate." Id. (citing Binks Mfg. Co. v. Nat. Presto Indus. Inc., 709 F.2d 1109, 1119 (7th Cir. 1983)). Further, "even after a claim is denied, reports of investigations filed thereafter which contain prior investigations or evaluations, or are merely a continuation of the initial routine investigation, may not be labeled as work product." APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10, 14 (D. Md. 1980).

The only disputed element here is whether the materials were prepared in anticipation of litigation. Bronsink asserts that the withheld documents were produced in the ordinary course of business and not in anticipation of litigation. Depositors makes no showing that the withheld documents were prepared in anticipation of litigation. It fails to answer this threshold question and focuses instead on Bronsink's burden to show compelling need sufficient to overcome protection. But a plaintiff only bears that burden when a defendant has demonstrated the protection first applies. See Hickman v. Taylor, 329 U.S. 495, 511 (1947). With no specific evidentiary proof that demonstrates their resolve to litigate, Depositors has failed to show work product protection exists. Therefore, the documents withheld pursuant to work product are not protected and the Court orders Depositors to produce them.

Conclusion

Plaintiff's motion is GRANTED. Depositors has failed to provide sufficient evidence supporting its claims of either attorney-client privilege or work product for the withheld documents. Depositors will produce the requested materials within seven days of this order.

The Clerk is directed to send a copy of this order to all counsel of record.

DATED this _4th_ day of March, 2010.

Marsha J. Pechman
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DONNA R. BATCHELOR,

Plaintiff,

v. Case No. 6:11-cv-1071-Orl-37GJK

GEICO CASUALTY COMPANY,

Defendant.

ORDER

This cause is before the Court on the following matters:

(1) Plaintiff's Motion to Compel and/or for an In-Camera Inspection and for Sanctions (Doc. 275), filed March 14, 2016; and

(2) Geico's Response in Opposition to Plaintiff's Motion to Compel and for Sanctions (Doc. 276), filed March 31, 2016.

BACKGROUND[1]

This insurance bad faith action is currently set to be retried during the August trial term. (*See* Doc. 297.) A retrial is required because Geico's litigation misconduct prevented Plaintiff from fully and fairly presenting her case to the jury at the first trial. (*See* Doc. 267 ("**New Trial Order**"), pp. 36–40; *see also* Doc. 291, pp. 11–12, 36.) The prejudicial misconduct was initially revealed at trial when Geico elicited false testimony from its own attorney ("**Formella Testimony**"). (*See* Doc. 267, p. 4; Doc. 201, p. 3.) Plaintiff promptly objected and advised the Court that the Formella Testimony was

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[1] Given the interim nature of this Order and the extensive procedural and factual background set forth in the Court's prior Orders, the Court provides an abbreviated Background section. (*See* Doc. 267, pp. 1–32; *see also* Doc. 136.)

contradicted by a privileged document that Geico inadvertently disclosed during discovery ("**$20K Communication**"). Upon a necessarily limited review, the Court agreed with Plaintiff that the $20K Communication directly contradicted the Formella Testimony and found that Geico had waived its attorney client communication privilege ("**ACCP**") concerning Plaintiff's claim for underinsured motorist benefits ("**Waiver Finding**").

After a post-trial hearing (Doc. 266 ("**First PTH**")) and *in camera* review of the waived documents,[2] the Court determined that Geico's litigation misconduct also included: (1) withholding and redacting non-privileged material during discovery based on improper assertions of ACCP; (2) submitting false statements to the Court during discovery to avoid *in camera* inspection of its improperly withheld and redacted documents; (3) eliciting the false Formella Testimony; and (4) substantially prejudicing Plaintiff's case by using ACCP as a sword at trial after aggressively employing it as a shield in discovery. (*See* Doc. 267, pp. 7–9, 16–17, 23–25, 34–40, n.49; *see also* Doc. 291, pp. 11–12, 35–36.) The Court further determined that a fair retrial would not be possible until Plaintiff had access to all of Geico's improperly withheld and waived documents. (*See* Doc. 270 ("**Production Order**"), p. 2.) Thus, the Production Order required Geico to produce to Plaintiff:

> (1) Unredacted copies of all documents identified on Geico's pre-trial amended privilege log ("**Pre-Trial APL**") (Doc. 110-1);
>
> (2) Unredacted copies of all documents that Geico [had] not yet produced to Plaintiff that are responsive to Plaintiff's First Request for Production to Defendant (Doc. 77-2), including but not limited to the following:
>
> (a) Geico's claim file for claim number 0100106910101044;

[2] (*See* Docs. 189, 190, 197, 199; *see also* Docs. 182, 197.)

(b) Geico's claim file and litigation file for claim number 0100106910101025; and

(c) All files for claim number 0100106910101025 which were created or maintained by [Formella,] Lori Nazry Ross, and/or the Law Office of Stephen L. Lanoso ("**Retained Counsel**"). (See Docs. 182, 197, 199.)

(*See* Doc. 270.) The *only* limitation on these production obligations concerned documents dated or created after October 10, 2011 ("**State End Date**"). (*See* Doc. 270, p. 1.)

On December 4, 2015, Geico produced documents from: (1) Geico's Regional Claim File ("**RC File**") at Bates numbers GLC 1 through GLC 611; (2) Geico's Claims Home Office Legal File ("**GHOC File**") at Bates numbers GHOC 1 through GHOC 541; (3) Geico's Extracontractual Regional File ("**ECRO File**") at Bates numbers ECRO 1 to ECRO 1395; and (4) Geico's Extracontractual Home Office File ("**ECHO File**") at Bates numbers ECHO 1 through ECHO 448 (collectively, "**PT Production**"). (*See* Doc. 273; Doc. 275, pp. 5–6.) Geico also produced a forty-two page amended privilege log ("**Second APL**"), which combined Geico's own thirty-two page privilege log with a ten page privilege log describing certain documents in the possession of Geico's attorneys in this action—Young, Bill, Roumbus & Boles, P.A. ("**YPL**")—("**YPL Documents**"). (*See* Docs. 273, 275-1.)

On March 14, 2016, Plaintiff moved: (1) for *in-camera* inspection of the YPL Documents; (2) to compel production of improperly withheld documents listed on the Second APL; and (3) for entry of a default judgment against Geico as a sanction for Geico's "willful" violations of the Production Order ("**March Motion**"). (*See* Doc. 275.) Geico responded (Doc. 276 ("**Response**")), and—after another hearing (*see* Docs. 279, 291 ("**Second PTH**"))—the Court directed Geico to submit the YPL Documents for *in*

camera review. (*See* Doc. 281.) On May 11, 2016, Geico provided the Court with Bates-stamped copies of the YPL Documents and filed a Third Amended Privilege Log ("**Third APL**"), which included the new Bates numbering. (*See* Docs. 282, 282-1.)

Upon consideration of the Third APL and *in camera* review of the documents identified thereon, the Court finds that the March Motion is due to be granted in part and denied in part.[3] As detailed below, the Court will compel Geico to produce additional documents to Plaintiff on or before **Wednesday, July 6, 2016**.

DISCUSSION

I. Document Production

According to the Response, the Court should deny the March Motion in its entirety because: (1) the March Motion was improperly filed because Plaintiff did not comply with Local Rule 3.01(g); (2) Plaintiff's request for sanctions and its arguments concerning pre-trial discovery misconduct are foreclosed by the New Trial Order; (3) Geico properly withheld non-responsive and privileged documents from the PT Production; and (4) although the Second APL included minor errors and Geico inadvertently withheld a few responsive documents, it has corrected these errors. (*See* Doc. 276.) Finally, Geico assured the Court that it "has not engaged in any improper conduct with respect to the discovery in the instant action." (*See id.* at 17–21; *see also* Doc. 291.)

[3] Because the Court reviewed the withheld documents and the YPL Documents *in camera*, to the extent that the March Motion requests *in camera* review, it is due to be denied as moot. Further, *in camera* review of the YPL Documents confirm that they either are not discoverable or are not responsive. Thus, the March Motion also is due to be denied to the extent that it seeks production of the YPL Documents.

The Court rejects Geico's first two arguments.[4] Only jaundiced eyes bathed in Lethe could—as Geico does—read the New Trial Order as a victory for it based on purported findings that: (1) "GEICO properly asserted" ACCP prior to trial; and (2) no sanctions of any kind should be imposed on Geico. (*See* Doc. 276, pp. 4–5, 17.) The Court made no such findings.[5] To the contrary, the Court has consistently and repeatedly found that Geico's conduct in discovery was improper and resulted in prejudice to Plaintiff. (*See* Doc. 267, pp. 7–9, 16–17, 23–25, 34–40, n.49; *see also* Doc. 291, pp. 11, 12, 35, 36 (noting that many of Geico's pre-trial redactions to its "A-log" were not "justified").)

The Court also rejects Geico's third argument. Importantly, the New Trial and Production Orders were entered so that: (1) Plaintiff would have a fair opportunity to present her claim to a jury; (2) Geico would reap no reward for prejudicing Plaintiff and causing unfair and wasteful judicial proceedings; and (3) Geico would be deterred from future litigation misconduct. (*See* Doc. 267, p. 5 n.20; Doc. 271, pp. 5–8 (discussing Plaintiff's post-trial discovery needs); *see also* Doc. 291, pp. 35–36 (explaining that the Court intended to sanction Geico for its litigation misconduct).) Apparently indifferent to such concerns, Geico again denied Plaintiff access to discoverable documents based on its own view that the documents do "not pertain to coverage, benefits, or damages stemming from" the Plaintiff's claim for underinsured motorist benefits. (*See* Doc. 276.)

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[4] Although displeased with the attorneys' respective recitation of the events that preceded filing of the March Motion, the Court declines to deny the March Motion based on Plaintiff's purported violation of Local Rule 3.01(g). (*See* Doc. 291.)

[5] When the New Trial Order was briefed by the parties, Plaintiff did not yet have access to the PT Production; thus, she could hardly be expected to fully and fairly brief the ultimate sanctions issue. Thus, the New Trial Order addressed only Plaintiff's limited and specific request for the sanctions of default judgment "and an award of all attorney's fees and costs" (*see* Doc. 218, pp. 1, 14). (*See* Doc. 267.)

Notably, the Court lacks confidence in "Geico's representations" in this action—particularly, "anything that Geico might say with respect to what is or is not" in its files.[6] (Doc. 291, pp. 12–13; *id.* at 36 ("Geico has lost credibility in this case with respect to what they call things," and "how they categorize, classify, and file" their records).) Accordingly, after conducting another *in camera* review of the withheld documents, the Court finds that Geico should have included the following documents in its Post-Trial Production:

ECRO 0006 through ECRO 0013;

ECRO 0015 through ECRO 0016;

ECRO 0022 through ECRO 0026;

ECRO 0669 through ECRO 0675;

ECRO 0677 through ECRO 0690;

ECRO 0692;

ECRO 0698 through ECRO 0699;

ECRO 0701 through ECRO 0744;

ECRO 1406; and

ECRO 1421.

Subject to limited redactions, Geico also should have produced ECRO 0693 through ECRO 0697 and ECRO 0691.

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[6] Geico's independent relevance determinations are based on: (1) narrow readings of the Court's Waiver Finding and Production Order, and (2) interpretations of Florida Supreme Court decisions—*Provident Life & Accident Insurance Co. v. Genovese*, 138 So. 3d 474 (Fla. 2014) and *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121 (Fla 1992). Geico's analysis is particularly inapt here because *Genovese* and *Ruiz* are irrelevant to Geico's current production obligations, and the Court previously rejected Geico's tortured interpretation and application of these cases.

II. Sanctions

Geico's response to Plaintiff's request for sanctions adheres to it modus operandi of denying and downplaying the Court's findings,[7] while insisting that it is faultless[8] and Plaintiff is debauched.[9] Although perplexed and concerned by Geico's response, the Court declines to entertain the distinct and complex issue of what sanctions—if any—should ultimately be imposed on Geico for its extensive and apparently ongoing litigation misconduct.[10]

ADDITIONAL PROCEEDINGS

Previously, the Court granted the parties' motion to extend the expert report deadline (Doc. 278) and vacated the deadline previously set (Doc. 274). (Doc. 281.) Although the Court has granted the March Motion in part and directed Geico to produce

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[7] For instance, Geico notes that the Court denied Plaintiff's requests for mistrial while ignoring the Court's subsequent disavowal of that decision. (*Compare* Doc. 276, p. 3, *with* Doc. 267, p. 5 (stating that it "should have granted" mistrial).) Geico also inexplicably denies that the Court has found that the Formella Testimony was false. (*Compare* Doc. 276, p. 17, *with* Doc. 267, p. 36, n.46 (finding that the "falsity" of the Formella Testimony appeared "to be supported by a preponderance of the evidence"); *see also* Doc. 182, p. 1 (noting "good cause" for Plaintiff's concern that Geico elicited false testimony from Formella).)

[8] (*See* Doc. 267, p. 17 (insisting that "GEICO has not engaged in any sanctionable . . . or improper conduct with respect to the discovery in this action"); *id.* at 18 (asserting that "GEICO's conduct has neither been unreasonable nor vexatious").)

[9] (*See* Docs. 234, 235, 237; *see also* Doc. 276, pp. 7, 17–18 (describing as "simply unfounded" the Plaintiff's arguments that Geico's has not complied with the Court's Orders and Rules).) In a cunning combination of these techniques, Geico characterizes the March Motion as a backlash to Plaintiff's purported recognition that the PT Production fully supports Geico's defense. (*See* Doc. 276, p. 6.)

[10] Because the Court denied the March Motion in part, sanctions are not required by Federal Rule of Civil Procedure 37(a)(5)(A). Although the Court has discretion to impose an apportioned sanction pursuant to Rule 37(a)(5)(C), it declines to do so at this time as it would unnecessarily divert focus and resources away from preparation for the upcoming trial. If and when sanctions are finally addressed, this Order will certainly be pertinent to any determination.

additional documents, the Court finds that no additional fact discovery is warranted, and the parties should be able to complete expert discovery within a month of the deadline for Geico's additional production. Unfortunately, the extension will place the expert discovery deadline in early August—which is when the trial is set. Given this fact, the Court will move the trial back one more month—to September 2016. Only the most extraordinary circumstances would justify another extension; accordingly, the Court does not anticipate that either party will file a motion to extend the final deadlines set in this Order.

CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

(1) Plaintiff's Motion to Compel and/or for an In-Camera Inspection and for Sanctions (Doc. 275) is **GRANTED IN PART AND DENIED IN PART**.

(a) To the extent *in camera* inspection of documents is requested, the Motion (Doc. 275) is **DENIED AS MOOT**.

(b) To the extent an award of sanctions is requested, the Motion (Doc. 275) is **DENIED WITHOUT PREJUDICE**.

(c) To the extent an order compelling production of documents is requested, the Motion (Doc. 275) is **GRANTED** as set forth below in paragraphs (2) and (3).

(d) In all other respects, the Motion (Doc. 275) is **DENIED**.

(2) On or before **July 6, 2016**, Geico is **DIRECTED** to produce the following documents:

ECRO 0006 through ECRO 0013;
ECRO 0015 through ECRO 0016;
ECRO 0022 through ECRO 0026;

ECRO 0669 through ECRO 0675;
ECRO 0677 through ECRO 0690;
ECRO 0692;
ECRO 0698 through ECRO 0699;
ECRO 0701 through ECRO 0744;
ECRO 1406; and
ECRO 1421.

(3) On or before **July 6, 2016**, Geico is **DIRECTED** to produce redacted versions of ECRO 0693 through ECRO 0697 and ECRO 0691. In a brief *ex parte* communication, the Court will advise counsel for Geico of the permitted redactions for each of these documents.

(4) On or before **July 20, 2016**, Plaintiff may serve any amended expert reports or disclosures.

(5) On or before **July 29, 2016**, Defendant may serve any amended expert reports or disclosures.

(6) On or before **August 8, 2016**, the parties shall complete any additional expert discovery.

(7) A Final Pretrial Conference is set for 10:00 a.m. on **August 18, 2016**.

(8) A Jury Trial will commence in the September trial term, which commences on **September 6, 2016**.

(9) If Geico fails to comply with this Order in all respects, the Court will consider whether it should impose the most severe sanction of default judgment against Geico in lieu of the retrial.

DONE AND ORDERED in Chambers in Orlando, Florida, on June 29, 2016.

ROY B. DALTON JR.
United States District Judge

Copies:

Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GEORGE TERRY LANGLEY,

Plaintiff,

v.

GEICO GENERAL INSURANCE COMPANY,

Defendant.

No. 1:14-CV-3069-SMJ

ORDER DENYING MOTION TO EXPEDITE, MOTION TO QUASH TRIAL SUBPOENA AND SETTING A TELEPHONIC STATUS CONFERENCE

Before the Court, without oral argument, is Defendant GEICO General Insurance Company Motion to Quash Trial Subpoena to Rory W. Leid, ECF No. 205, and a related Motion to Expedite, ECF No. 207. GEICO moves the Court for an order quashing a trial subpoena issued by Plaintiff to its lead attorney, Rory Leid, on the ground that this Court's protective order precludes his testimony. Plaintiff opposes GEICO's motion on the ground that Washington law presumes that there is no attorney-client privilege between the insured and the insurer in the claims adjusting process. *See Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 698, 295 P.3d 239 (2013). The Court denies both motions.

GEICO's primary argument is not persuasive. District court are not bound by their previous orders before judgment is entered. FED. R. CIV. PROC. 54(b); *Amarel v. Connell*, 102 F.3d 1494, 1414 (9th Cir. 1996). And even if this Court were bound by the protective order, the Court did not conclude that Leid did not act as a quasi-fiduciary but rather said there was no indication that he so acted. The Court misunderstood the burden at the time. In a bad faith insurance suit, Washington law presumes that no attorney-client privilege exists between the insured and the insurer during the claims adjusting process. But the insurer may overcome that presumption by showing that its attorney only provided legal advice.

> We start from the presumption that there is no attorney-client privilege relevant between the insured and the insurer in the claims adjusting process, and that the attorney-client and work product privileges are generally not relevant. However, the insurer may overcome the presumption of discoverability by showing its attorney was not engaged in the quasi-fiduciary tasks of investigating and evaluating or processing the claim, but instead in providing the insurer with counsel as to its own potential liability; for example, whether or not coverage exists under the law.

Cedell, 176 Wn.2d at 698-99 (internal citations omitted). The question is not whether there is evidence that Leid acted as a quasi-fiduciary (as the Court understood the question when ruling on the protective order), but whether GEICO has proven that he did not. And GEICO has made no such showing.

Alternatively, GEICO argues that Plaintiff's disclosure was untimely under Rule 26(a) and the Court can quash Leid's subpoena under Rule 37(c)(1). But Rule 26(a)(3) requires that fact witnesses be disclosed within 30 days of trial. And Plaintiff listed Leid as a witness on November 6, 2015, more than 30 days before the then-scheduled start date of January 11, 2016. ECF No. 149.

The Court concludes that Leid is a proper witness that was timely disclosed.

Because Leid is lead attorney for GEICO, this presents a challenge. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless (1) the testimony relates to an uncontested issue, (2) the testimony relates to the nature and value of legal services rendered in the case, (3) disqualification of the lawyer would work substantial hardship on the client, or (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate. Wash. Rules of Prof. Conduct 3.7.

Accordingly, the Court sets a telephonic hearing for tomorrow, **Thursday, May 5, 2016 at 1:30 PM** to determine (1) whether Leid may continue to serve as advocate in this case and (2) if not, how long GEICO will need to get new counsel prepared to go to trial. Because of the issues to be discussed, an attorney other than Mr. Leid must appear on behalf of GEICO. Mr. Leid may also appear.

The parties are directed to confer with each other prior to this hearing.

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Accordingly, **IT IS HEREBY ORDERED**:

1. Defendant's Motion to Expedite, **ECF No. 207**, is **DENIED**.

2. Defendant's Motion to Quash Trial Subpoena to Rory W. Leid, **ECF No. 205**, is **DENIED**.

3. A telephonic conference is set for **Thursday, May 5, 2016 at 1:45 PM**. Parties are directed to call the Court's public conference line: 1-888-808-6929; Enter Access Code: 3648461; and Security Code: 0145 at the time specified for hearing. Use of mobile phones is prohibited.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 4th day of May 2016.

SALVADOR MENDOZA, JR.
United States District Judge